

material facts relating to this obligation. The Department of Justice, through the INS, is responsible for disapproving H-1B and other petitions filed by an employer found to have engaged in misrepresentation or failed to meet certain conditions of the labor condition application (8 U.S.C. 1182(n)(2)(C)(i)-(iii); 1182(n)(5)(E)).

(c) *Employer's responsibilities.* Each employer seeking an H-1B nonimmigrant in a specialty occupation or as a fashion model of distinguished merit and ability has several responsibilities, as described more fully in this subpart and subpart I, including—

(1) The employer shall submit a completed labor condition application (LCA) on Form ETA 9035 in the manner prescribed in § 655.720. By completing and signing the LCA, the employer agrees to several attestations regarding an employer's responsibilities, including the wages, working conditions, and benefits to be provided to the H-1B nonimmigrants (8 U.S.C. 1182(n)(1)); these attestations are specifically identified and incorporated by reference in the LCA, as well as being set forth in full on Form ETA 9035CP. The LCA contains additional attestations for certain H-1B-dependent employers and employers found to have willfully violated the H-1B program requirements; these attestations impose certain obligations to recruit U.S. workers, to offer positions to U.S. workers who are equally or better qualified than the H-1B nonimmigrant(s), and to avoid the displacement of U.S. workers (either in the employer's workforce or in the workforce of a second employer with whom the H-1B nonimmigrant(s) is placed with indicia of employment by that employer (8 U.S.C. 1182(n)(1)(E)-(G)). These additional attestations are specifically identified and incorporated by reference in the LCA, as well as being set forth in full on Form ETA 9035CP. If the LCA is certified by ETA, a copy will be returned to the employer.

(2) The employer shall make the LCA and necessary supporting documentation (as identified under this subpart) available for public examination at the employer's principal place of business in the U.S. or at the place of employment within one working day after the

date on which the LCA is filed with ETA.

(3) The employer then may submit a copy of the certified LCA to INS with a completed petition (INS Form I-129) requesting H-1B classification.

(4) The employer shall not allow the nonimmigrant worker to begin work until INS grants the worker authorization to work in the United States for that employer or, in the case of a nonimmigrant who is already in H-1B status and is changing employment to another H-1B employer, until the new employer files a petition supported by a certified LCA.

(5) The employer shall develop sufficient documentation to meet its burden of proof with respect to the validity of the statements made in its LCA and the accuracy of information provided, in the event that such statement or information is challenged. The employer shall also maintain such documentation at its principal place of business in the U.S. and shall make such documentation available to DOL for inspection and copying upon request.

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§ 655.710 What is the procedure for filing a complaint?

(a) Except as provided in paragraph (b) of this section, complaints concerning misrepresentation in the labor condition application or failure of the employer to meet a condition specified in the application shall be filed with the Administrator, Wage and Hour Division (Administrator), ESA, according to the procedures set forth in subpart I of this part. The Administrator shall investigate where appropriate, and after an opportunity for a hearing, assess appropriate sanctions and penalties, as described in subpart I of this part.

(b) Complaints arising under section 212(n)(1)(G)(i)(II) of the INA, 8 U.S.C. 1182(n)(1)(G)(i)(II), alleging failure of the employer to offer employment to an equally or better qualified U.S. worker, or an employer's misrepresentation regarding such offer(s) of employment, may be filed with the Department of Justice, 10th Street & Constitution Avenue, NW., Washington, DC 20530. The Department of Justice shall

investigate where appropriate and shall take such further action as may be appropriate under that Department's regulations and procedures.

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§ 655.715 Definitions.

For the purposes of subparts H and I of this part:

Actual wage means the wage rate paid by the employer to all individuals with experience and qualifications similar to the H-1B nonimmigrant's experience and qualifications for the specific employment in question at the place of employment. The actual wage established by the employer is *not* an average of the wage rates paid to all workers employed in the occupation.

Administrative Law Judge (ALJ) means an official appointed pursuant to 5 U.S.C. 3105.

Administrator means the Administrator of the Wage and Hour Division, Employment Standards Administration, Department of Labor, and such authorized representatives as may be designated to perform any of the functions of the Administrator under subpart H or I of this part.

Aggrieved party means a person or entity whose operations or interests are adversely affected by the employer's alleged non-compliance with the labor condition application and includes, but is not limited to:

(1) A worker whose job, wages, or working conditions are adversely affected by the employer's alleged non-compliance with the labor condition application;

(2) A bargaining representative for workers whose jobs, wages, or working conditions are adversely affected by the employer's alleged non-compliance with the labor condition application;

(3) A competitor adversely affected by the employer's alleged non-compliance with the labor condition application; and

(4) A government agency which has a program that is impacted by the employer's alleged non-compliance with the labor condition application.

Area of intended employment means the area within normal commuting distance of the place (address) of employment where the H-1B nonimmigrant is or will be employed. There is no rigid

measure of distance which constitutes a normal commuting distance or normal commuting area, because there may be widely varying factual circumstances among different areas (*e.g.*, normal commuting distances might be 20, 30, or 50 miles). If the place of employment is within a Metropolitan Statistical Area (MSA) or a Primary Metropolitan Statistical Area (PMSA), any place within the MSA or PMSA is deemed to be within normal commuting distance of the place of employment; however, all locations within a Consolidated Metropolitan Statistical Area (CMSA) will not automatically be deemed to be within normal commuting distance. The borders of MSAs and PMSAs are not controlling with regard to the identification of the normal commuting area; a location outside of an MSA or PMSA (or a CMSA) may be within normal commuting distance of a location that is inside (*e.g.*, near the border of) the MSA or PMSA (or CMSA).

Attorney General means the chief official of the U.S. Department of Justice or the Attorney General's designee.

Authorized agent and *authorized representative* mean an official of the employer who has the legal authority to commit the employer to the statements in the labor condition application.

Certification means the determination by a certifying officer that a labor condition application is not incomplete and does not contain obvious inaccuracies.

Certify means the act of making a certification.

Certifying Officer and *Regional Certifying Officer* mean a Department of Labor official, or such official's designee, who makes determinations about whether or not to certify labor condition applications.

Chief Administrative Law Judge (Chief ALJ) means the chief official of the Office of the Administrative Law Judges of the Department of Labor or the Chief Administrative Law Judge's designee.

Department and *DOL* mean the United States Department of Labor.

Division means the Wage and Hour Division of the Employment Standards Administration, DOL.